

INDEX

	<i>Page</i>
I. STATEMENT OF CASE.....	1
II. STATEMENT OF QUESTIONS INVOLVED.....	12
III. QUEEN INS. CO. v. GLOBE INS. CO. (263 U. S. 487).....	12
IV. ARGUMENT.....	16
1. Burden of proof.....	16
2. Proximate cause of <i>Llama</i> 's loss marine perils.....	16
3. The stranding brought about by errors of navigation of ship's officers and crew	34
4. <i>Muller v. Ins. Co.</i>	42
5. The seizure and detainment clauses.....	44
V. INTEREST.....	47
VI. CONCLUSIONS.....	48

INDEX TO CASES

<i>American Hawaiian S. S. Co. v. Bennett</i> , 207 Fed. 510.....	19
<i>Anderson v. Martin</i> , 1908 A. C. 337.....	46
<i>Britain S. S. Co. v. King</i> (1921), 2 A. C. 99, 113, 119.....	16
<i>Cory & Sons v. Burr</i> , 8 A. C. 393 (1893).....	44
<i>John A. Donald v. United States</i> , 39 Ct. Cl. 357.....	19
<i>General Mutual Ins. Co. v. Sherwood</i> , 14 How. 361.....	28
<i>Goff v. Withers</i> , 2 Burr. 263.....	45
<i>Hagimayer Trading Co. v. St. Pauls Ins. Co.</i> , 266 Fed. 14.....	19
<i>Ins. Co. v. Transp. Co.</i> , 12 Wall. 194.....	19, 27
<i>Leary v. U. S.</i> , 81 U. S. 607.....	19, 22
<i>Morgan v. U. S.</i> , 61 U. S. 531.....	18, 20
<i>Matiana, The</i> , 1 A. C. 99 (1921).....	20, 29
<i>Magoun v. New Eng. Ins. Co.</i> , 1 Story 157.....	45
<i>Munro Brice & Co. v. War Risk Assn.</i> , 34 L. R. 331.....	16
<i>Muller v. Ins. Co.</i> , 246 Fed. 759.....	42
<i>Petersham, The</i> , 1 A. C. 99 (1921).....	20, 29
<i>Queen Ins. Co. v. Globe Ins. Co.</i> , 263 U. S. 487.....	12
<i>Reybold v. U. S.</i> , 82 U. S. 202.....	19, 24
<i>Trinder Anderson & Co. v. Thames & Mersey Ins. Co.</i> , 1898, 2q. B. 114.....	20

APPENDIX

Majority opinion of the Circuit Court of Appeal.....	49
--	----



In the Supreme Court of the United States

OCTOBER TERM, 1924

STANDARD OIL COMPANY OF NEW JERSEY,
as owner of the Steamship "Llama,"
petitioner
v.
THE UNITED STATES OF AMERICA

No. 169.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIR-
CUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

I

STATEMENT OF CASE

The libel is filed to recover upon two war-risk insurance policies issued by the Government for loss of the tanker *Llama* and her freights and advances through stranding in daytime under the best weather and sea conditions, while proceeding through Westray Firth north of Scotland with a channel way four miles in width. Her owners, under the usual method of self-insurance, had assumed all marine risks. Admittedly the *Llama* was lost by stranding (an ordinary marine peril) which was caused by errors

of navigation on part of ship's officers (also ordinary marine perils). Prior to the errors of navigation, a British armed guard, following the usual practice, had boarded the tanker to see that she put into Kirkwall as the previous arrangements by her owners with the British Government required and which routing the bill of lading covered. This boarding is characterized as seizure or detainment. The assured asserts that the loss relates thereto and is a loss from war perils. Even if this boarding be seizure or detainment, which the Government denies, the seizure is not the proximate cause of the loss, which was stranding brought about by negligent navigation.

The facts are stated in sequence. The tanker *Llama*, formerly owned by the German subsidiary of the petitioner and then flying the German flag, on October 21, 1914, was transferred and registered in the name of petitioner with change to American flag. After the transfer the vessel was employed in carrying petroleum products trans-Atlantic. For purposes of its own, late in 1914 and in 1915, the British Government made it a practice to board vessels bound for Scandinavian ports to satisfy itself that the cargoes aboard were neutral and not destined for aid of its enemies. For such examination the vessels were stopped and an armed guard consisting of a young navy officer and several seamen was placed aboard to see that the vessel proceeded to a named port, usually Kirkwall, where her papers would be examined. After the production of satisfactory evidence that the cargo was neutral-owned and not destined

for the enemy, the vessel continued her voyage to destination. In order to avoid possible delays, prior to the *Llama* loss, the Standard Oil Company made an arrangement with the British Government to route all its vessels via Kirkwall (the port of examination) for the purpose of the examination of the vessels' documents as stated. This intended to and did provide considerable dispatch to the tanker.

The war-risk policies insured the whole of the *Llama* and her freight and advances from loss by war risks. The applicable clauses of the policy read:

Touching the adventures and perils which the insurer is contended to bear, and does take upon itself, they are of men-of-war, letters of marque and countermarque, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and peoples, of what nation, condition, or quality soever, and all consequences of hostilities of warlike operations, whether before or after declarations of war * * *.

Warranted free from claim consequent upon or arising from the ultimate destination of the cargo being the country of a belligerent. (Italics ours.)

They covered a voyage from New York to Copenhagen and return "with privilege of a port or ports of call for admiralty instructions." The bills of lading called for a voyage "now lying in the port of New York and bound for Copenhagen via Kirkwall." These routings were for carrying out the arrangement made by owners with the British Government

for sending all its vessels to an admiralty port of call for examination of documents.

While proceeding upon her voyage toward Kirkwall (north of Scotland), when at a distance approximately 400 miles west of Orkney Island, the *Llama* was hailed by the British Cruiser *Virginian* and then boarded by a young British naval officer, then 22 years of age, and four men, consisting of a petty officer, a stoker, a marine, and an a. b., to make certain that the vessel did report to Kirkwall as her documents provided and as the arrangement by owners with the British Government required. This young lieutenant had joined the British Navy in October, 1914, then having the lowest grade of merchant license (second officer) issued by the British Government. The necessity of taking aboard the armed guard and of stopping at Kirkwall had been required on the previous voyage of the *Llama* and of all other vessels of the libelant and was expected. *No objections were offered.* The instructions issued by the Government to the boarding officers, were (R., p. 92)—

Responsibility for the navigation of the vessels sent in should *never be undertaken* unless absolutely necessary. The master should be given the special route to be followed, the officer in charge of the armed guard exercising sufficient supervision to see that this is carried out and rendering any assistance asked for.

We emphasize that this boarding did not change the voyage upon which the vessel was routed. The *Llama* was putting into Kirkwall just as the special

agreement by owners with the British Government required and for an examination of documents to determine ultimate destination of cargo which such arrangements intended. Her owners had obligated themselves to the British Government to have the vessel put into Kirkwall for such examination so as to determine ultimate destination of cargo. The war risk policy covered "privilege of port or ports of call for admiralty instructions" and the typewritten rider attached to the policy provided:

Warranted free from claim consequent upon or arising from the ultimate destination of the cargo being the country of a belligerent.

Query: In any view does not this rider relieve the underwriter from any consequences of loss by stranding through putting into Kirkwall for examination to determine ultimate destination of cargo? We say it does.

After an examination of the vessel's papers (covering only a few minutes, R. p. 252) which showed her routing to Kirkwall, the *Llama* proceeded toward Kirkwall, the only instructions given by the cruiser was to see that the vessel proceeded north of Scule Skerry and North Roma, well-known landmarks, and not to pass between the islands at night. (R. p. 66.) The course the tanker was on would have taken her north of these landmarks. The master of the *Llama* laid off all the courses on the chart and gave the directions for the courses. The tanker continued upon her original course under the direction

and control of her own master, officers, and crew. (R. p. 67.)

On October 30 the vessel lay off Noup Head, the vessel having hove to for the night, intending to pass between the islands by daylight. The master, as representing owners, agreed this was the proper thing to do. (R. p. 53.) There were two passages from Noup Head to Kirkwall, one called the Westray Firth passage and the other the Fair Island passage; the latter is about 50 miles longer.

The master of the *Llama* had taken the Westray Firth passage on the previous voyage. The naval lieutenant had never been through this passage, always using the Fair Island passage. (R. p. 73, 74.) The British Island Pilots for 1915 (No. 149, Vol. VI, p. 211) declares Westray and Stronsay Firths as "great natural thoroughfares." It describes Fair Isle (p. 163) as "useful fairway beacon bound to Archangel and Greenland (via Shetland)." There is a seaway four miles in width for the safe navigation of vessels through Westray Firth, and at the time the passage was undertaken the weather was clear, fair wind, and smooth sea. The stranding occurred at 9:07 a. m. The Circuit Court of Appeals has determined that the route through Westray Firth was selected by the master and the sailing course plotted and sailing directions upon which the vessel was at time of stranding given by the master to the ship's officers. The master showed such course to the British lieutenant. The

lieutenant approved the course, as it took the vessel to Kirkwall. (R. p. 178, 183.)

Prior to the stranding and from the time that the 8 o'clock watch began the ship had no lookout, which was a contributing fault to the stranding, because had there been a ship's lookout properly stationed the breakers would have been apparent and proper steps could have been taken to avoid the submerged rocks on which the vessel stranded. Again, the attention of the officer on watch was directed to breakers by one of the British guard when the vessel was one or two miles distant, but such officer took no steps to inform the captain or change course. There were clear errors of navigation in the plotting of the course and the sailing directions, otherwise this vessel would not have stranded on charted rocks in daytime where the fairway was four miles in width.

While proceeding through Westray Firth, having four miles in width of seaway, weather clear, sea smooth, the *Llama* stranded at 9.07 a. m. (according to her log) on October 31, 1915, and became a total loss.

We read the contemporaneous written statements evidenced by the ship's log and the protests and sworn affidavits of the ship's officers before the Recorder of Wrecks as definitely determining that the loss of the *Llama* was due to marine perils and not proximately related to the boarding by the British guard two days previously.

The log book designates a voyage from New York to Copenhagen via Kirkwall. It is kept in the same manner before the boarding as afterward and except for entries made in the rough log on October 29, the day of the boarding, no reference is made of the British lieutenant or his guard. Had the lieutenant assumed control of the navigation, such fact would have appeared by the vessel's log. By the log, the ship was navigated by her officers and crew, the same after the boarding as before, regular sights were taken, sea watches maintained, and sailing courses settled. The log entry at time of boarding was (R. p. 259):

Remarks Oct. 29, 1915, 6:59 (A. M.).
Stopped by British Cruiser in Lat. —, Long. —,
7:30. British officer boarded ship. 7:31 Eng.
(engines) half speed ahead. 7:35 Received
order from cruiser to proceed on our voyage.

The log entry shows no lookout during the watch at the time of stranding. The log indicates only a voyage under direction and control of master.

The log entries covering the stranding October 31, 1915, are (R. p. 254):

- (A. M.) 6.30. Stopped engines.
- 6.40. c/c S. C. (corrected compass,
Standard Comp.).
- S. 44 E. full speed.
- 6.50. Noup Head L. H. S. S. W.
Similar weather preceding.
- 9.07. Struck a reef in Westray Firth.

There is not the slightest reference that the young 22-year-old English lieutenant assumed charge of the

navigation or directed the course or was in any way responsible for the stranding of the vessel.

On November 2, 1915, the master under oath before the Receiver of Wrecks at Kirkwall, submitted the following report (R. p. 174):

That the said ship was bound for Copenhagen in Denmark via Kirkwall.

* * * * *

That the said ship proceeded on the said intended voyage as above stated until she reached a point about 600 miles westward of the Orkney Islands, when she was boarded by a British naval prize crew on the morning of October 29th. Noup Head of Westray was made about four miles to northeast about 8 p. m. on the evening of the 30th. *Deponent decided to lie off land until daylight.* (Italics ours.)

That on Sunday, the 31st day of October, at 8 a. m., the tide at the time being ebb, the weather slightly hazy, and the wind in the southerly direction blowing gusty and variable with a heavy swell from the southeast, the said ship entered Westray Firth to make a fairway down the Firth. *The vessel was holding a course South Magnetic which was considered safe by deponent and by the naval officer of the Prize Crew.* Vessel was proceeding at full speed, eight knots, when about half a mile southwest of the Skerries, which lie off Berskness Westray, the vessel suddenly grounded on a submerged and uncharted rock and remained fast. The engines were put full speed astern without result. * * *

That, in deponent's opinion, the cause of the casualty was *a submerged and uncharted rock and it could not have been avoided.* (Italics ours.)

On November 13, 1915, an extended protest was made by the master before the American Consul which stated (R. p. 148):

The said ship proceeded on the said intended voyage as above stated until she reached a point about 400 miles westward of the Orkney Islands, when she was boarded by a British Naval Prize Crew on the morning of October 29th; Noup Head of Westray was made about 4 miles to northeast about 8 p. m.; on the evening of the 30th the master decided to lie off land until daylight; that on Sunday the 31st day of October, 1915, at 8 a. m. the tide at the time being ebb, the weather slightly hazy, and the wind in the southerly direction, blowing gusty and variable with a heavy swell from the southeast, the said ship entered Westray Firth to make a fairway down the firth. *The vessel was holding a course south magnetic, which was considered safe by the master and by the naval officer in charge of the prize crew.* The vessel was proceeding at full speed 8 knots. When about half a mile southwest of the Skerries which lie off Brest Ness, Westray, the vessel suddenly grounded on a submerged and uncharted rock and remained fast. * * *

That in the master's opinion the cause of the casualty was a submerged and uncharted rock and could not have been avoided. (Italics ours.)

On October 26, 1916, the District Court for the Southern District of New York filed an opinion in the *Muller v. Globe & Rutgers Ins. Co.* case (unreported). On January 11, 1917, the assured filed proofs of loss, accompanied by copies of pleadings and decisions in the *Muller* case. The affidavit in support of the loss, dated December 30, 1916, makes the first written reference to the English lieutenant selecting courses or commanding the vessel. Supporting affidavit of the third officer, dated May 25, 1917, was filed, which is inconsistent with his testimony taken later. May 5, 1919, libel filed and on December 1, 1919, and June 19, 1920, the third officer and master were examined; the wheelsman was not called nor his absence accounted for, nor were the ship's work books and charts produced nor their absence accounted for. On August 5, 1920, the Government examined in London the five naval men who boarded the *Llama*.

The District Court (D. C. N. J., Lynch, D. J.) upon certain findings of fact determined the loss proximately resulted from perils covered by the war-risk policies upon the authority of *Muller v. Globe & Rutgers Fire Ins. Co.* (246 Fed. 759). Emphatically challenging the findings of fact made by the District Court, an appeal was taken by the Government to the Circuit Court of Appeals for the Third Circuit (Buffington, C. J., McKeehan, D. J., and Davis, C. J.). By a majority opinion

(Buffington, C. J., concurred in by McKeehan, D. J.) the court stated new findings of fact and determined the proximate cause of the loss was stranding (marine perils) contributed to by negligent navigation of ship's officers (marine perils). The specific finding is that the *Llama* was navigated by her own officers at the time of the stranding and was not being navigated by the British officer. (R. p. 183.)

The case is now on review by certiorari.

II

STATEMENT OF QUESTIONS INVOLVED

(1) Whether or not, where the proximate cause of the loss of the vessel is stranding (marine peril) caused by negligent navigation (marine peril), such loss must be characterized as a loss proximately resulting from marine perils and not from war perils.

(2) Whether or not, assuming assured is entitled to recover, which is denied, interest is payable upon the amount of the loss, and if so, from what date?

III

QUEEN INS. CO. v. GLOBE INS. CO. (263 U. S. 487)

Since the granting of the writ of certiorari, this court has filed an opinion in the case of *Queen Ins. Co. v. Globe Ins. Co.*, which we read to be decisive of the questions this case presents. The facts were (p. 491):

It will not be necessary to state the facts in detail. They are fully set forth in the decisions below, but those that are material to

our conclusion need but a few words. The *Napoli* sailed from New York for Genoa with a cargo of which a part was intended for the Italian Government and a small part was munitions of war. All of it was contraband. At Gibraltar she joined a convoy, as it was practically necessary to do, although not ordered by the military powers. The convoy sailed with screened lights, protected by British, Italian, and American war vessels, and navigated by an Italian commander on the *Napoli*, subject to the command of a British captain as the senior naval officer present. The route to be followed was ordered beforehand up to a point where instructions from Genoa were to be received but were not, as the convoy was ahead of the scheduled time. At about midnight July 4 another convoy similarly commanded met this one head on. It was seen only a very few minutes before the meeting; there was much confusion, and one of its vessels, the *Lamington*, a British steamship, struck the *Napoli* and sank her. As our judgment is based on broader grounds, we do not describe the movements bearing upon the nice question whether the navigation of the *Napoli* or the *Lamington* was in fault.

Mr. Justice Holmes, speaking for the court, said (pp. 492, 493):

On the other hand, the common understanding is that in construing these policies we are not to take broad views but generally are to

stop our inquiries with the cause nearest to the loss. This is a settled rule of construction, and, if it is understood, does not deserve much criticism, since theoretically at least the parties can shape their contract as they like. *Morgan v. United States* (14 Wall. 531) applied this rule beyond the limits of insurance to a charter party made during the Civil War, by which the United States assumed the war risks and the owners were to bear the marine risks. The boat carrying troops and stores was compelled to put to sea by the orders of a quartermaster given to meet what he thought the exigency of the service, although the danger was obvious and the master and pilot advised against it. This Court recognized the hardship of the owners' case, in view of the peremptory order to proceed to sea, but declined to look beyond the wind and waves that were the immediate cause of the loss. A similar decision was reached by the House of Lords after the late war in a case where the chartered vessel, the *Petersham*, was sailing without lights because of Admiralty regulations and collided with a Spanish vessel also without lights, and it was found that because of the absence of lights the collision could not have been avoided by reasonable care. (*Britain Steamship Co. v. The King*, (1921), 1 A. C. 99; affirming the decision of the Court of Appeal (1919), 2 K. B. 670. See *Morgan v. United States*, 5 Ct. Clms. 182, 194; *Reybold v. United States*, 5 Ct. Clms. 277, 283, 284.)

The same principle was applied to insurance, the special field of this narrow construction, in the case of the *Matiana* heard and decided with the *Petersham*, where a vessel was sailing under convoy and struck a reef without negligence on the part of the master or the naval officer in command of the escort. The discussion turned largely on the question whether the remoter causes of the collision and stranding were war-like operations, and from the tenor of the arguments on the one side and the other it may be doubted whether *Morgan v. United States* would not have been thought to go too far. But the *Matiana* certainly goes as far as the decision below in this case. There are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business, and as we could not reverse the decision below without overruling *Morgan v. United States*, we are of opinion that the decree of the Circuit Court of Appeals must be affirmed. We repeat that we are dealing not with general principles but only with the construction of an ancient form of words which always have been taken in a narrow sense, and in *Morgan v. United States* were construed to refer only to the nearest cause of loss, even when there were strong grounds for looking beyond it to military command.

We apply this decision to determine the proximate cause of the loss of the *Llama* to be a marine loss whether the facts as adopted by the District Court or by the Circuit Court of Appeals be applied.

IV

ARGUMENT**(1) BURDEN OF PROOF**

Loss by stranding at sea being a marine peril, the burden is on the petitioner (assured) to establish the loss falls on the War Risk underwriters. (*Britain S. S. Co. v. The King* (1921) 2 A. C. 99, 113, 119; *Munro Brice & Co. v. War Risk Ass'n.*, 34 L. R. 331.)

The Circuit Court of Appeals, after making very careful reviews of the facts, stated findings of facts which determined the loss a marine loss, and concluded that the petitioner had not sustained the burden of proving the loss a war risk one. As its opinion so carefully reviews the facts, we copy the opinion in full as an appendix, and adopt it as stating our review of the facts. We assume this opinion will be adopted by this court as its statement of facts. A careful examination of the record reaffirms these facts. The rule announced in *Queen Ins. Co. v. Globe Ins. Co.*, *supra*, determines the loss a marine one.

(2) PROXIMATE CAUSES OF LLAMA'S LOSS MARINE PERILS

Admittedly, the *Llama* was lost by stranding (an ordinary marine peril) which was brought about by errors in navigation (also ordinary marine perils). The errors in navigation include failure to keep a proper lookout—the *Llama* had no lookout; failure to take sights or accurate sights; failure to check up sailing courses; failure to take a safe course; failure to take precaution to avoid stranding

when the breakers were apparent. There was negligent navigation in other respects.

The assured reasons the boarding of the vessel constituted the war peril of capture or seizure and caused the marine perils of navigation which in turn caused the marine peril of stranding. The reasoning is not merely that the cause of the cause of the proximate cause of the loss was a war peril, but that the remote boarding itself was the proximate cause of the stranding.

The necessity of taking on board an armed guard and of stopping at Kirkwall was foreseen by Libellant. It was a matter of arrangement by the assured with the British authorities and the policy provided for deviation to "port of call." The typewritten rider to the policy relieves the insurer from liability by reason thereof:

Warranted that the goods are destined for the country of the port to which they are insured and *free of claim consequent upon or arising* from their ultimate destination being a country of a belligerent. (R. p. 260.)

The stranding resulted directly from errors in navigation as distinguished from a deliberate attempt to beach the vessel for a military purpose to be gained by a destruction of the vessel, such as to obstruct a channel or to land troops. The proximate cause was a sea peril—stranding; the secondary cause errors of navigation—sea perils; the remotest cause is said to be boarding by British officers. If the proximate cause of the loss is sea peril—risks not

insured against, our inquiry is at an end—we do not look for the cause of the peril.

It is well settled that when an error in navigation or the negligence of the officer, (irrespective of whether or not he is the agent of the shipowner) in charge of the navigation of the vessel has directly caused the stranding and loss, the proximate cause is not the error in navigation or the negligence, but the sea peril of stranding or shipwreck.

The following analysis of the decisions shows that in cases where a marine peril is a cause immediately preceding or next (proximate) to the disaster (or is the last in the series of causes or chains of causation), the proximate cause is the sea peril. The United States Supreme Court and other courts have invariably held that the *marine peril* was the "proximate cause" of the loss, notwithstanding other perils or causes (mere *causae causans*) may have caused the vessel to become subject to the marine peril.

Case at bar—*Llama*: (1) Seizure—war peril—caused (2) error in navigation—marine peril—caused (3) stranding—marine peril. Proximate cause was (3) stranding.

(1) *Queen Ins. Co. v. Globe Ins. Co.* (263 U. S. 487): (1) Order of convoy commander required vessel to proceed on definite course, which (2) contributed to collision (marine peril). Held proximate cause (2) collision marine peril.

(2) *Morgan v. United States* (61 U. S.; 14 Wall. 531): (1) Military order of United States Army officer against protest of master and of United States

Government pilot in charge—war peril—caused (2) stranding—marine peril. Held proximate cause was (2) stranding.

(3) *Leary v. United States* (81 U. S.; 14 Wall. 607): (1) Military order of United States Army officer—war peril or extraordinary marine peril—caused (2) stranding—ordinary marine peril. Held proximate cause was (2) stranding.

(4) *Reybold v. United States* (82 U. S.; 15 Wall. 202): (1) Military order of United States Army officer—war peril—caused (2) shipwreck in ice floe—marine peril. Held proximate cause was (2) shipwreck—marine peril.

(5) *John A. Donald v. United States* (39 U. S. Court of Claims, 357): (1) Military order of United States Army officer—war peril—caused (2) stranding—marine peril. Held proximate cause was (2) stranding.

(6) *Hagemeyer Trading Company v. St. Paul Marine Insurance Company* (266 Fed. 14; C. C. A. 2nd Circuit, 1920): (1) Negligence of British prize crew caused (2) fire. Held proximate cause was (2) fire.

(7) *Insurance Company v. Transportation Company* (12 Wall. 194, 199): (1) Collision—caused (2) fire. Held proximate cause was (2) fire.

(8) *American-Hawaiian Steamship Company v. Bennett* (207 Fed. 510, 514; C. C. A., 9th Circuit): (1) Error in navigation caused (2) stranding. Held proximate cause was (2) stranding.

The English decisions apply the same rule:

(1) *The Matiana*—House of Lords—England (1921, 1 A. C. 99): (1) Military order permitting no discretion of master of vessel—war peril, caused (2) stranding—marine peril. Held proximate cause was (2) stranding.

(2) *The Petersham*—House of Lords—England (1921, 1 A. C. 99): (1) Military order permitting no discretion of master of vessel—war peril, caused (2) collision—marine peril. Held proximate cause was (2) collision.

(3) *Trinder, Anderson & Company v. Thames & Mersey Insurance Company* (1898, 2 Q. B. 114, 123): (1) Negligent navigation by officer not an agent of shipowner caused (2) stranding. Held proximate cause was (2) stranding—marine peril.

In *Morgan v. United States*, 81 U. S. 531 (more fully reported 8 Ct. of Claims, 18), the owners of a vessel let her to the Government in time of war—they officering and manning her and agreeing to keep her in repair and fit for the service in which she was engaged—and they to take the marine risks but the Government the war risks. The court held that a stranding of the vessel incurred by her attempt to cross a bar in charge of a Government pilot, upon an order of the quartermaster of the United States Army, when the wind was high and the water low—the quartermaster having seen the vessel strike on a previous attempt to cross and had given the present, a second, order with a full knowledge of the danger of crossing, against the judgment

of both the master and pilot, because the exigencies of the military service, in his judgment, required the attempt to be made—was to be regarded as a marine risk and not a war risk and that the owners and not the Government should bear the loss.

Mr. Justice Davis, delivering the opinion of the Supreme Court, said (14 Wall. 584, 535):

In the condition of things then existing, it became necessary to make provision for two classes of perils. This was done; the United States assuming the war risk, while the owners of the boat agreed to bear the marine risk. If, therefore, the stranding of the boat in going over the bar was owing to a peril of the sea, her owners, and not the Government, must bear the loss. That the high wind and low stage of water were the efficient agents in producing this disaster are too plain for controversy. They were the proximate causes of it, and in obedience to the rule "*causa proxima non remota spectatur*" we can not proceed further in order to find out whether the fact of war did not create the exigency which compelled the employment of the vessel. If it did, it was known to the owners when the charter party was formed, who, with this knowledge, became their own insurers against the usual sea risks, and must abide the consequences of their stipulation.

There is a certain degree of hardship in this case growing out of the peremptory order of the quartermaster to proceed to sea, but this is outside of the contract, and, if worthy

of being considered at all, must be addressed to another department of the Government.

In *Leary v. United States*, 81 U. S. (14 Wall. 607), the owners of a vessel chartered her to the Government for the purpose of plying in the harbor of Port Royal in South Carolina or for such other service as the Government might designate. It was stipulated that in case the vessel, while executing the orders of the Government, should be destroyed or damaged, or by being compelled by the Government to run any extraordinary marine risk, the owners should be indemnified. In complying with the orders of the harbor master of the United States Army in Port Royal, the vessel struck upon the fluke of a sunken anchor in the harbor and was sunk. The court held that the risk which the vessel thus incurred was not an extraordinary marine risk, but was an ordinary risk which every vessel runs that enters a harbor and which every marine policy covers.

In the statement of the case it is said (pages 608, 609):

While under charter, the vessel was lying at one of the wharves in the harbor of Port Royal. On the 12th of May, 1863, the military harbor master ordered her out to make room for another steamer. The captain of the *Mattano* objected to going out, as the tide was very low; and, as he believed, there was a considerable breeze from an unfavorable quarter. The harbor master ordered the *Mattano* peremptorily to back out, and her captain let go his lines and did so. In thus backing out

she struck upon the fluke of a sunken anchor imbedded in the sand, and sunk in fifteen minutes.

This anchor, against whose fluke the vessel struck, was a mooring anchor and had been placed where it was by the United States quartermaster, to moor big ocean steamers prior to November, 1862, and had a buoy attached to it which showed its position; but, about the first of January, 1863, the buoy had gone adrift in a gale of wind, and had never been replaced, and there was nothing at the time of the accident to warn vessels of the position of the sunken anchor. No one could have pointed out where the anchor was at that time. The captain of the *Mattano* knew of the existence of the anchor, but thought he was a long way outside of it. There was no unskillfulness in executing the order to back out * * *.

On this case the Court of Claims decided that the disaster was a usual marine disaster, such as was covered by ordinary marine policies of insurance, and not such extraordinary marine risk as was contemplated in the charter party; and that if the owners neglected to protect themselves against such perils by insurance they would have to bear the loss. The court accordingly dismissed the petition, and hence the appeal to this court.

Mr. Justice Field, delivering the opinion of the Supreme Court, said (14 Wall. 612, 613):

The second ground presented by the appellants for a reversal of the decree is readily

answered. The risk that the vessel incurred in complying with the orders of the harbor-master was not an extraordinary marine risk within the meaning of the charter party. The term extraordinary is there used to distinguish an unusual risk which the vessel might be compelled to run by order of the Government, from those risks which would be covered by an ordinary marine policy and which might be expected to arise from the service in which the vessel was engaged. The contract of the Government was not intended to apply to the usual risks attendant upon the performance of a service such as was here mentioned, but risks outside and beyond them.

The risk incurred was of a possible collision with a sunken anchor in the harbor. This was an ordinary risk which every vessel must run that enters a harbor and is one which every marine policy covers.

In *Reybold v. United States* (82 U. S.; 15 Wall. 202), the Government chartered a vessel during the War of the Rebellion, the owners agreeing to keep her "tight, staunch, strong, well manned," etc., and to bear the marine risks; the war risks to be borne by the Government. After entry of the vessel on the charter party, she being then in the Potomac River at Washington and the navigation considerably obstructed by ice, the quartermaster of the United States Army ordered the captain of the vessel to receive certain men and horses and to proceed on the next morning out of the river to City Point. The captain made no objection to the order because, as he

testified, "he considered it imperative as a military order and as such obeyed it, though if he had considered that he could have used his judgment he would not have left the wharf, as he did not consider it safe." Having accordingly received the men and horses he set off. In going down the river, the vessel, though "tight, staunch, strong, well manned," etc., was wrecked by the ice. The Supreme Court held that the risk was a marine risk—not one of war; and that though the acquiescence of the master deprived the act of the quartermaster of being a tortious act, no recovery could be had in the Court of Claims.

Counsel for the shipowner argued (p. 205):

In the present case the order of the quartermaster * * * defined and specified the time for the commencement of the voyage. The departure of the vessel at that time, in face of apparent danger, was an unskillful and negligent act of navigation, for which the United States and not the owners are responsible. The order of the quartermaster was a military order, issued by a military officer of the United States acting in discharge of his official duty in time of war. Obedience to it could not be refused. * * * It can not be said that the master acquiesced, in the proper sense of the word, in the order given. His opinion was not asked, nor was he consulted in regard to the dangers to be encountered in making the voyage. * * * The voyage was not made the subject of negotiation or consultation between him and the quartermaster. The order was given and

received and obeyed, as a military order simply, imperative in its terms and admitting no question.

Mr. Justice Davis, delivering the opinion of the Supreme Court said (15 Wall. 206, 208):

This case is in only one particular different from that of *Morgan v. United States*, decided at the last term. Both were contracts of affreightment, with stipulations that the United States should bear the war risk and the owners the marine risk. * * * In each case the loss sued for was occasioned by the perils of the sea, and in both the effort has been, notwithstanding the express terms of the contract that the owners were their own insurers against such risks, to shift the responsibility upon the United States.

It was insisted in Morgan's case that the owners were relieved and the government chargeable, because the master was compelled to proceed to sea by the peremptory order of the quartermaster, when, in his judgment, expressed to that officer, the state of the wind and tide rendered it hazardous to do so, but we held, as in several previous cases, that if this was so, it was outside of the contract—a tortious act of the officer—and, therefore, not within the jurisdiction of the Court of Claims.

In the present case the master made no objection to the order requiring him to proceed on his voyage, and this constitutes the only difference between the two cases. This difference, however, instead of helping the cause of the claimant, makes the justice of the defence still clearer. It was the business of the

master to know whether the navigation of the river was dangerous or not and, naturally, he would be better informed on such a subject than a quartermaster of the United States. How are we to know, in the absence of proof, that the order would have been given, or, if given, not withdrawn, had the master stated that in his opinion, in the state of the river, it was unsafe to attempt to make the voyage? Why not speak of the danger when he told the quartermaster, in reply to an inquiry on the subject, prior to the order being given, that his vessel was sheathed with iron and had capacity to take the men and horses to City Point? This was the time to have spoken as the object of the inquiry was plainly to ascertain whether or not the boat, if she had the requisite capacity, was in a condition to withstand the masses of ice which were floating in the channel of the river. It is very clear that, upon the information which was given, in the absence of any objection to the proposed voyage, the officer of the government had the right to suppose, in the judgment of the master, it could be safely undertaken. It is no excuse to say that the master at the time knew it was unsafe to leave the wharf, but said nothing because he considered the order a military one, and as such, to be obeyed.

In *Insurance Company v. Transportation Company* (12 Wall. 194, 199) Mr. Justice Strong, delivering the opinion of the Supreme Court, said:

There is, undoubtedly, difficulty, in many cases, attending the application of the maxim,

"proxima causa, non remota spectatur," but none when the causes succeed each other in order of time. In such cases the rule is plain. When one of several successive causes is sufficient to produce the effect (for example, to cause a loss), the law will never regard an antecedent cause of that cause, or the "causa causans." In such a case there is no doubt which cause is the proximate cause within the meaning of the maxim. . . .

It is true, as argued, that as the insurance in this case was only against fire, the assured must be regarded as having taken the risk of collision, and it is also true that the collision caused the fire, but it is well settled that when an efficient cause nearest the loss is a peril expressly insured against, the insurer is not to be relieved from responsibility by his showing that the property was brought within that peril by a cause not mentioned in the contract.

In *General Mutual Insurance Company v. Sherwood*, 14 How. 361, 366, Mr. Justice Curtis, delivering the opinion of the Supreme Court, said:

When a peril of the sea is the proximate cause of a loss, the negligence which caused that peril is not inquired into. . . . In applying this maxim (*causa proxima, non remota, spectatur*) in looking for the proximate cause of the loss, if it is found to be a peril of the sea, we inquire no further; we do not look for the cause of that peril.

The controlling English authority is the *Matiana* (House of Lords L. R. 1 A. C. 99, 1921), affirming the unanimous decision of the Courts of Appeals,

reported under name of *British India Steam Navigation Company v. Green et al.*, L. R. 2 K. B. (1919) p. 670—reversing *Bailhache*, J. (1919) 1 K. B. 632. The *Matiana* was lost by stranding at night while following the set course laid down by the Convoy commander. The proximate cause of the loss was held to be the marine peril of stranding.

Lord Sumner said:

As for *The Matiana*, she was sailing with convoy. She was bound to take her course from the senior officer of the convoy and did so, and, thanks to the set of a variable current, she came unexpectedly on to the Keith Reef. Her operation also was proceeding on her trading voyage. It is true she did so by an unusual route, but the deviation was justifiable and obligatory. She found in her way a rock, submerged and unlighted, which, in itself, was a marine peril. It was a moonlight night, and if there had been any wind she would probably have seen the break of the sea on the reef in time. As it was a still night she had no warning and she stranded. Why is such a stranding a consequence of warlike operations? *The Matiana* had to do as she was told, but she was not told to go aground either directly or indirectly. I think that the case of *The Matiana* can only be distinguished from that of *The Petersham* by dwelling on the facts, first, that she was in convoy, and, second, that, in addition to general orders as to not exhibiting lights, she was under particular orders as to the course to be shaped and the stations to be kept. In brief, sailing in convoy is only

sailing in company and is no more a warlike operation than sailing alone. If, for the sake of protection in case of danger, *The Matiana* had kept as close as she could to a King's ship casually encountered, she would still have been peacefully occupied. What difference is made by additional orders given ad hoc by the senior naval officer? It is suggested that the case is the same as if he had been on her bridge, had himself laid and directed her course, and had her steered straight on to the reef. Even if it were so, I am by no means prepared to say that this would have sufficed.

Not everything done by a King's ship or a King's officer, in time of war is necessarily a warlike operation or the consequence thereof. * * * It is not a case of deliberately running her aground for some purpose of war. Her course and station having been prescribed some hours before, she was in her own officer's charge, and there is no evidence to show or to suggest that the avoidance of a local obstacle in her track was not left to them, or that her orders were to keep her course, let the consequence be what it might. There is nothing to suggest that, if the rock had been visible, she was not entitled and bound to maneuver so as to avoid it. Her officers were not to blame, for they could not see it, but her inability to see the rocks seems to me to be indistinguishable from the *Petersham's* inability to see the *Serra*; there was nothing warlike about it—the peril of it was of the seas. For the rest, an order given by an officer in company and in authority referring

to a compass course does not really differ from an order given generally in Admiralty Regulations; it is a special order, but it is an order to do or to refrain, like the general order as to lights. Warlike operations and hostilities generally prevailing supplied the reason for it, but even if it was a consequence of an operation of war the stranding was not its proximate consequence.

Lord Atkinson said:

The duties and proper tasks of convoying warships and the ships they convoy are respectively indicated in ss. 30 and 31 of the Naval Discipline Act of 1866 (29 & 30 Vict. c. 109). The naval officers are to diligently perform the duties of convoying and protecting the ships they are appointed to convoy according to instructions, to defend these ships and the goods they carry without deviation, to fight in their defence if they are assailed and not to abandon them or expose them to hazard. Every master or other officer in command of any merchant or other vessel convoyed is bound to obey the commanding officer of the ships of war in all matters relating to the navigation of security of convoy, and is also bound to take such precautions for avoiding the enemy as may be directed by this commanding officer. It does not appear, however, that this latter officer has any power to require the master, officers, or crew of any merchant ship which is being convoyed to take combative action against a vessel of any kind, or to join in such action

if taken by all or any of the ships of war. The roles of the two classes of ships are entirely different in nature and character. That of the ships of war is protective and if need be combative; that of the merchantmen is not at all combative; and as far as the circumstances permit is as peaceful in nature and character as would be their enterprises in time of peace.

If this latter be the correct view, as I think it is, then in order that the underwriters of the war risk policy may be made liable, the "war-like operation" which is the proximate cause of the loss of the *Matiana* must have been something which was done by the attendant warships or their officers. The loss of a ship by striking or grounding on rocks is, as I have said, *prima facie* a marine risk. The burden of proving that it is, in this case, a war risk rests upon the owners of the *Matiana*, or on the underwriters under the marine policy. * * * (Quoting Warrington, L. J.): "There was no evidence that the naval officer's order to change the course was given in consequence of information that a submarine was in the neighborhood, in fact the contrary would appear to be the case, for the change had been arranged some hours before, the moment of the change only being left to be decided." He adds that the course prescribed was ordered, not for the purpose of avoiding or resisting attack by a particular enemy, whose presence was known, but as part of a series of precautionary measures taken for the safety of these merchant ships in waters in which

enemy craft might not improbably be encountered.

Applying the principles announced by these decisions, the proximate cause of the loss of the *Llama* was stranding (marine peril). The stranding was caused by errors of navigation on part of ship's officers (also marine peril). The earlier boarding of the *Llama* is suggested as a related cause. The loss having been caused by perils of the sea, we inquire no further, we do not look for the cause of that peril.

The Circuit of Appeals for the Second Circuit in its opinion in *Muller v. Globe & Rutgers Fire Ins. Co.* (246 Fed. 759), upon authority of which the District Court held the loss a war risk loss, based its conclusions upon its findings of proximate cause. As we read the decisions of the House of Lords in the *Petersham* and *Matiana* cases and the decision of this court in *Queen Ins. Co. v. Globe & Rutgers Fire Ins. Co.* the loss must be declared a marine loss.

The same principles and rulings of proximate cause must be applied whether the war risk loss has relation to the "hostilities" or to the "seizure or detainment" clauses of the war risk policy.

We reaffirm that upon the findings as made by the Circuit Court of Appeals the loss of the *Llama* must be determined a marine loss. And even upon the findings as made by the District Court, applying the rulings made in the English cases and the *Queen Ins. Co.* case cited, the loss must be determined a marine risk loss.

**3. THE STRANDING (MARINE LOSS) BROUGHT ABOUT BY
ERRORS OF NAVIGATION OF SHIP OFFICERS AND
CREW**

The review of facts as made by the petitioner for the most part relates to the statements made by the district court. The government emphatically challenged the correctness of such findings in the Circuit Court of Appeals, and does so now, if this court should determine to review the full evidence and restate the facts.

The accident occurred in broad daylight, under best conditions of sea and wind, while the vessel was proceeding through a fairway four miles in width, by stranding upon a reef to the westernmost edge of the fairway. By reference to the Pilot instructions to navigation, anyone would avoid these obstructions by lining up landmarks, over the ship stern and keeping just a little to the east of such line-up. Failure to do so is clearly error of navigation.

The tanker did not maintain a lookout, although the vessel was proceeding through the Firth. Had such lookout been maintained the breakers ahead may have been noticed before they were and proper steps taken by the ship officers to avoid the disaster.

The master of the *Llama* at all times remained in control of his vessel. The tanker was navigated by the ship officers and crew, upon courses which the master plotted and determined. The history of the voyage, by the vessel's log continued after the boarding as before.

The boarding did not affect the routing of the vessel. She was bound to Kirkwall, by previous arrangement between owners and the British Government. The sailing directions given by the cruiser "to keep north of Scule Skerry and North Roma" did not change any routing; the vessel would have passed these landmarks as her master planned. Up until the time the tanker reached Noup Head (R. p. 52) the master admits selecting and plotting the courses. Noup Head is the beginning of the passage between the islands to which the order "not to pass between the islands at night" related. The vessel did lay off Noup Head during the night (R. p. 53), so that when the ship was put under way on the morning of the stranding, all the sailing directions given by the cruiser had been complied with. All sailing orders were passed by the master to the ship officers and crew. The night order book was prepared by the master and in his handwriting (R. p. 29).

The exact testimony of what happened from the time the young lieutenant, 22 years of age, boarded the vessel up to the disaster, appears by Record, pp. 98-115. Certainly, until the *Llama* arrived at Noup Head, the *master set the course*, first laying it off on the chart. The lieutenant testified (p. 66):

I asked him if he would navigate the ship, to which he replied that he would. The captain then laid off the course as near as I can remember to Noup Head; and then he gave the order to—asked me, rather, if he could proceed; so I said, "Yes"; and he gave the order "Full speed ahead," and set the course.

Q. Who laid off the course on the chart?—
A. The captain.

Q. Who gave the directions for setting it?—
A. The captain.

Q. State whether or not you took any part whatever in the navigation of the ship on that course.

Mr. SYMMERS. Objected to as a statement of a conclusion.

Q. (Mr. Staley). Answer the question.

A. I took no part in laying the course off; the only part I took was in looking after it afterwards to see that it complied with my orders from the captain.

Q. And that was what?—A. That was to pass to the northward of North Rona and Scule Skerry. The course did that and so I never mentioned it again.

This would be confirmed by the production of the original chart and work book. They were not produced, nor their absence accounted for. If any facts were to the contrary, the log, protest, or report of the wreck would have stated it.

Again (p. 67):

Q. (Mr. Staley). Now, as I understand it, the master laid the course towards Noup Head?—A. Yes.

Q. And the ship was set on that course?—
A. Yes.

Q. What happened after that so far as the navigation of the ship was concerned or the laying down of courses, or discussions, or what not?—A. The captain laid all courses down and he always informed me what he had done.

Q. During the time who was actually on the bridge as officer in charge?—A. The captain.

Q. He would not be there constantly?—A. Or one of the ship's officers.

Q. And who was at the wheel?—A. One of the ship's crew.

Q. Did your men attend the wheel at all at any time?—A. No, never.

Q. The course was set towards Noup Head, when was it changed about, and what was the occasion for the change, if any?—A. We made no change of course until we sighted Noup Head to the best of my recollection, and then it was only to dodge around or what they call heave to until the morning.

This practically confirms all the other testimony relating to the course to Noup Head.

There is a conflict in the testimony as to the selection of the course after Noup Head was reached. The lieutenant testified (R. pp. 68, 69):

Q. Did you know what day he sighted Noup Head, assuming that you boarded her on the 29th October as the master states?—A. Sighted Noup Head on the 30th.

Q. What time of day?—A. Well, on the afternoon.

Q. Did you go in past Noup Head that night, or did you lay off during the night?—A. Oh, no; we lay off well clear of the land.

Q. Was there any conversation between yourself and the master of the *Llama* as to the course you should take from Noup Head to Kirkwall?—A. Yes.

Q. When was that, and state exactly what the conversation was?—A. That was during this evening; I can not remember the time, but it was after we have hove to; the captain of the *Llama* came to me and said could he go through the Westray Firth. * * * I replied to him that I did not know the Westray Firth, having never been through it before. He said: "Oh, that is all right, I have been through; I went through on my last trip." I said: "If you know the passage, captain, you can make it as far as the Government is concerned."

Q. Was there any discussion at that time about any other passage?—A. He mentioned that it was more preferable than the Fair Island passage.

Q. State whether or not you previously had used this Fair Island passage.—A. I personally have always used the Fair Island passage before, not knowing the coast too well.

Q. And do I understand you to say that prior to that time you had never been through the Westray Firth to Kirkwall?—A. No; I had never been through at that time.

Q. Have you ever taken a ship through subsequently?—A. No; I have never taken a ship through subsequently.

Again (R. p. 63):

Q. Who laid the course on the chart?—A. The captain.

Q. Who gave the directions as to the course to follow?—A. The captain.

Q. Did you hear him give the directions?—
A. I can not say that I did hear him give them.

Q. Did you give any directions at any time?—A. No; I gave no directions.

Q. At any time?—A. No.

Q. Please state in sequence just exactly what happened so far as you observed it after you came out from breakfast.—A. I came out from breakfast and I went straight out on the bridge; I had a look around and then went into the chart room where the captain was, and he showed me the position of the ship. I had a few words with him about what he was steering.

Q. Do you recall exactly what was said?—
A. I can not recall what he said, but he just gave me to understand that he was going through Westray Firth.

Mr. SYMMERS. I object to this unless this witness can recall the language or approximately the language of the captain.

A. And then I went out on the bridge again and saw breakers on the port bow.

Q. How much on the port bow?—A. I should say about a point or half a point.

Q. And how far distant about?—A. One to two miles, I should think.

Q. Go on.—A. I then went into the chart room again and told him what I had seen, and suggested that he had better take steps to clear it, which he immediately went out and did.

Q. Who was in charge of the bridge at the time?—A. One of the ship's officers.

Q. Was he standing right there on the bridge?—A. He was on the bridge at the time.

Q. Did you say anything to him?—A. Never spoke to him.

Q. Only spoke to the master?—A. Only spoke to the master.

Q. Did you ever speak to the man at the wheel?—A. Never.

Q. What happened after that?—A. The captain altered his course about four points, I think. Then very soon after that we struck.

Q. Where did you strike?—A. On the bow.

Again, page 70—

Q. (Mr. Staley). So that I may have it definitely on the record, who laid down all the courses after you had passed North Rona and the Scule Skerries?—A. The captain.

Q. You mean the captain of the *Llama*?—A. Yes; the captain of the *Llama*.

Q. Who actually plotted them on the chart?—A. The captain of the *Llama*.

Q. State whether or not at any time you gave any directions of any kind whatever either to the officer in charge of the bridge or the quartermaster on the *Llama*?—A. At no time did I ever give any orders to the crew of the *Llama*.

Q. Or to any of the officers in charge of the bridge?—A. Yes.

Q. Is that correct?—A. That is correct.

Q. At the time you struck was there any doubt as to your striking a rock or obstruction?—A. Not in my mind.

The only testimony which suggests the lieutenant selected the course through Westray Firth is the unsupported evidence of the master. All documents, where such fact would be recorded, log protest-examination before Receiver of Wrecks are silent.

In order to avoid any misunderstanding of the testimony of Jensen, which is reviewed by the petitioner (p. 30), we review his testimony on cross-examination:

Q. What are you able to say that passed between them?—A. I am able to say a conversation passed between them.

Q. You don't know what was said?—A. I don't know what was said; no, sir.

Q. On direct examination this morning you have said that the British officer gave some information to the man at your wheel?—A. Yes, sir.

Q. Did he give him an order?—A. He didn't give him an order, but he emphasized the order that I had already issued.

Later on, he attempted to testify what was said, but in view of this examination little weight can be given to the same.

Jensen said, cross-examination (R. p. 30):

Q. I believe I understood you to say that when this highland was sighted, the British officer told the man at the wheel to steer for that?—A. He pointed to the land and told him to steer.

Q. Do you recall his language?—A. No; I was probably three feet away.

Q. Did you hear him say to the man, "steer for that highland"?—A. I heard him speak to the man at the wheel and direct with his hands, steer for that.

Q. *Did you hear what he said?*—A. No.

Q. *You don't know what he said?*—A. No; but—

Q. *You don't know what he said to the man at the wheel?*—A. No; I didn't hear.

Cunningham, one of the guard, called the third officer's attention to breakers when the vessel was two or three miles distant. (P. 87.) The third officer admits seeing breakers ahead and not reporting them to the master, although he says he told the lieutenant. (R. p. 31.) His duty was to report to the master—again negligence on part of ship's officer.

Assuming the lieutenant did plot the course, which no one contends he did, the duty still rested upon the master to check up the positions and sailing courses, as representing the owner. Had the master done so, there would have been no difficulty in determining the proper sailing course. Failure to do so again is negligent navigation on part of the master in the performance of the duties he owed his owner.

4. MULLER v. THE INSURANCE CO. (246 FED. 759).

The facts in the *Muller case* were that the *Canadia* when seized was told to go by the passage between the islands by night with the aids to navigation destroyed or removed against the protest of the master. While proceeding by dead reckoning and

soundings—at night—the vessel stranded. The master was compelled to attempt the passage against his protest. The Circuit Court of Appeals applied the doctrine of proximate cause and reached the conclusion the loss a war risk one, adopting the facts and reasoning of the English Courts in *British Co. v. The King*, 33 L. T. R. 520. If the court had had before it the *Matiana*, *Petersham*, and the *Napoli* cases (*supra*), we believe the court should have reached a different conclusion. In *British Co. v. King*, the war risk underwriters admitted there had been no negligence intervening causing the collision. The distinct rule there was announced (at p. 522) that if the collision had been caused by the negligence of those in charge of the vessel, the loss would have been declared a marine loss. These distinctions are noticed in the latter cases of the *Petersham* and the *Matiana* (*supra*).

The facts in this case are different. The stranding was in daytime, while the vessel was upon her course suggested by and laid by her master. The master made no protest. The stranding on charted rocks could only have resulted through negligent navigation. If the stranding itself is not the proximate cause, negligent navigation causing such stranding was the proximate cause. It was negligence, subsequent to the boarding, which intervened and caused stranding. The facts distinguish the cases. We believe under the rulings in the *Matiana*, *Petersham* and *Napoli* decisions (*supra*) decided since the *Muller* case, the loss of the *Canadia* must be declared a marine loss.

5. THE SEIZURE AND DETAINMENT CLAUSES

The rule of proximate cause must determine whether the loss here is a marine loss or war risk loss.

The petitioner suggests (B. p. 22) that under the "well-settled law," the "seizure, restraint, and detainment" are regarded the proximate causes of the loss, if, before being delivered from those perils, the vessel is lost for any reason and not returned to her owners. We deny the application of the rule stated as applicable to this case. We review the cases cited.

In *Cory & Sons v. Burr*, 8 A. C. 393 (1883), the vessel was seized by a Spanish revenue officer and taken into Cadiz for smuggling tobacco into Spain contrary to law. The assured incurred expenses in resisting proceedings for the condemnation of the ship and was compelled to pay a sum of money in order to procure her restoration. The action was brought to recover such moneys from the underwriters. There was no loss from a marine risk. The policy warranted "free from capture and seizure." The court determined the loss related to the capture and seizure and not to the barratry of the master, which was the substantial question of law presented. The court said:

It was taken forcible possession of, and that not for a temporary purpose, not as incident to a civil remedy or the enforcement of a civil right, not as security for the performance of some duty or obligation by the owners of the ship, but it was carried into effect in order to obtain a sentence of condemnation and confiscation of the ship.

In *Magoun v. New England Marine Ins. Co.*, 1 Story 157, while the schooner with cargo was in the harbor, the vessel was seized and forcibly taken possession of by the local authorities on account of the master engaging in a supposed illicit and prohibited trade. The master was arrested and imprisoned. During the period of the vessel's detention, the vessel deteriorated and she could not be put in a seaworthy condition except at a sum in excess of her value. The court ultimately determined the vessel not subject to seizure and she was released. The owners abandoned the vessel to underwriters who refused to accept same and action was brought on the policy. There was no loss by perils of the seas (p. 164).

Whatever loss happened was from restraint and detainment. The court held owners were entitled to declare an abandonment to the underwriters and to recover for a total loss.

In *Goff v. Withers*, 2 Burr 683, the vessel was taken by the French, and her master, mates, and all the sailors removed and carried to France. Eight days later the vessel was retaken by the British. Much later, after recapture, the vessel was disabled and required cargo to be jettisoned. Owners had offered an abandonment upon the capture. The substantial question presented was the right of the owner to declare for an abandonment by reason of the original capture, although the vessel later may be recaptured and in a position to be restored to owners. The facts were held to entitle the owner to abandon his vessel

by the capture, and such right was not affected by the vessel subsequently being recaptured.

In *Anderson v. Martin*, 1908 A. C. 387, when the Japanese prize officer boarded the vessel *he announced that the ship was captured for carrying contraband. He assumed control of the vessel* and took her into a port other than destination. The vessel was condemned. The act itself constituted a capture and then entitled owners to declare an abandonment as a total loss to underwriters.

To have the rules announced in these cases applied, the act of the British lieutenant would have to be construed to have been such a seizure or capture of the *Llama* as would then have entitled the owners to abandon the same as a constructive total loss. No such claim ever has been made. The purpose of the officer remaining on the vessel was to see that she did what owners previously had arranged the vessel would do, namely, put into Kirkwall for examination of documents. The vessel continued upon the course selected by her master and under his navigation, subject to the most general direction as to the general course to pursue and which directions had been complied with previous to the stranding. The case can not present the question of right of abandonment through boarding by the British officer upon the theory that such act amounted to a capture which entitled the vessel to be condemned. The owner at all times retained possession of his vessel. The doctrine of proximate cause must determine the

issues of the case. The intervening negligence of ship's officers in the navigation of the ship (marine peril), brought about the stranding by which the vessel was lost (marine peril). Any capture, seizure, or detention was a prior act and not proximately related to the disaster.

V

THE QUESTION OF INTEREST

By the decree entered in the District Court, the principal sum awarded totaled \$161,947.16, with interest from October 31, 1915, to the entry of the final decree, which amounted to \$57,944.64. The final decree (erroneously as suggested) further allows interest on the aggregate sum (principal and interest) from the date of the decree until paid. The act conferring jurisdiction upon the District Courts sitting in admiralty over this litigation is silent upon any allowance of interest and there is no stipulation in the policy providing for the payment of interest. The appeal to the Circuit Court of Appeals raised the question as to the allowance of interest under the usual theory that in the absence of agreement or legislation, interest can not be recovered against the Government.

If interest is payable, as the claim is one in admiralty and the libel was not filed until three and one-half years after the loss, the question of allowance of any interest is within the discretion of the court. The clause in the policy provides (R. p. 10):

Claims will be paid within thirty days after complete proofs of interest and loss have been filed with the Bureau.

The preliminary proofs were filed January 11, 1917, and supplemental affidavits filed bear date September 17, 1917. In any view, interest does not begin to run until after September 17, 1917.

The further question is what rate of interest shall be applied. The District Court allowed 6 per cent. Under the Court of Claims and the Tucker Acts admiralty jurisdiction is conferred upon the courts, but interest is at the rate of 4 per cent only from the date of the judgment.

VI

CONCLUSIONS

It is respectfully submitted the decree of the Circuit Court of Appeals for the Third Circuit should be affirmed and the case remanded to the District Court with directions to dismiss the libel.

JAMES M. BECK,
Solicitor General.

J. FRANK STALEY,
*Special Assistant to the
Attorney General, In Admiralty.*

APPENDIX

We adopt the facts found by the opinion of Buffington, Circuit Judge, as the fair statement of the facts. (Record, p. 178.)

In the Court below, the Standard Oil Company of New Jersey, in pursuance of authorizing legislation, filed a libel against the United States War Risk Insurance Bureau on two policies of war risk insurance on its steamship *Llama*. On final hearing, that Court entered a decree adjudging the insurer liable for the loss of the steamer and from it the insurer took this appeal.

Inquiring as to the question involved in this case, we note that as the owners of the *Llama* assumed all marine risks and as she was lost by stranding, a marine peril, and as such stranding was caused by errors in navigations, also a marine peril, the question involved is whether the insured has shown that the proximate cause of the loss was not these marine perils or errors in navigation and stranding but was a war peril insured against, namely, "takings at sea, arrest, restraints and detainments of all Kings, princes and peoples, of what nation, condition or quality soever, and all consequence of hostilities or warlike operations."

The *Llama* sailed from New York for Copenhagen on October 14, 1915. She was routed "via Kirkwall," pursuant to a prior arrangement made by her owner, the Standard Oil Company, so that her documents could be examined. In pursuance thereof,

and as had been done on a previous voyage of the *Llama*, she was, on October 29, 1915, hailed and stopped by the British cruiser *Virginia*, and boarded by a lieutenant and four men. After the examination of her papers, which showed the vessel was duly routed "via Kirkwall" the *Llama* proceeded, the lieutenant and his party remaining on board. He had been directed by the *Virginia* (fol. 349) to see that the *Llama* keep North of Scule Skerry and North Rona, well-known landmarks, and not to pass between the islands at night.

Subject to these general directions, the captain of the *Llama*, as would appear from the absence from the log of anything indicating a departure from his previous conduct, laid off, entered all courses, and gave directions, the entries in the log being: "6.59, Stopped by British cruiser in Lat. $58^{\circ} .56$ N., Long. $11^{\circ} 58$ W. 7.30, British naval officer boarded ship with prize crew. 7.31, Eng. aft speed ahead. 7.35, Received order from cruiser to proceed. * * * 8.10, Eng. full speed ahead. * * * 10.30, Hoisted ship's number to British cruiser." The log entries contain the usual recital by name of the ship's officers on watch and of the ship's men on the lookout. Other than the above the log contains no entry or reference to the cruiser or of the officer and his men aboard the *Llama*. The entry of the 30th records that on that night North Rona was reached, viz: "10.35, North Rona abeam dist. off 9/," where the *Llama* hove to for the night at the Noup Head. From Noup Head there were two courses to Kirkwall, one called the Fair Island passage, the other, which the *Llama* took, was called the Westray Firth. The proofs show that the Master of the *Llama* had taken this later passage on

the previous voyage, and that the British officer on board had never taken it.

On the next morning while the *Llama* proceeded through the Westray Firth, where there was an open leeway of some four miles, she struck a submerged but charted reef and stranded. The time was daylight, and the sea conditions, as shown by the log, were "moderate sea, clear," and the entry in the log "9.07, Struck a reef in Westray Firth."

On November 13, 1915, Clinch, the Master of the *Llama*, appeared before the American Consul at Dundee, Scotland, and made oath to a marine protest of the loss, wherein his account thereof was given, as follows:

"The said ship proceeded on the said intended voyage as above stated until she reached a point about 400 miles westward of the Orkney Islands, where she was boarded by a British Naval Prize Crew on the morning of October 29th, Noup Head of Westray was made about four miles to Northeast about 8 p. m. On the evening of the 30th the Master decided to lie off land until daylight; that on Sunday the 31st day of October, 1915, at 8 a. m., the tide at the time being ebb, the weather slightly hazy, and the wind in the southerly direction, blowing gustily and variable with a heavy swell from the southeast, the said ship entered Westray Firth to make a fair way down the firth. The vessel was holding a course South magnetic which was considered safe by the Master and by the naval officer in charge of the prize crew. The vessel was proceeding at full speed 8 knots, when about half mile southwest of the Skerries, which lie off Fersness, Westray, the vessel suddenly grounded on a submerged and uncharted rock and remained fast."

In addition to the Master, John Caldwell, First Assistant Engineer (fol. 350), and the carpenter and some seamen, all unnamed, joined under oath in this account of the ship's mishap.

On November 2, 1915, the Master appeared and made statement under oath, at a hearing had by the Deputy Receiver of Wrecks, held in pursuance of the British Shipping Act of 1894, wherein he stated:

"12. That the said ship proceeded on the said intended voyage as above stated until she reached a point about 600 miles westward of the Orkney Islands when she was boarded by a British naval prize crew on the morning of October 29th. Noup Head of Westray was made about four miles to northeast about 8 p. m. on the evening of the 30th. Deponent decided to lie off land until daylight.

"13. That on Sunday, the 31st day of October, at 8 a. m., the tide at the time being ebb, the weather slightly hazy and the wind in the southerly direction blowing gusty and variable with a heavy swell from the southeast, the said ship entered Westray Firth to make a fairway down the Firth. The vessel was holding a course South magnetic which was considered safe by deponent and by the naval officer of the Prize Crew. Vessel was proceeding at full speed—eight knots, when about a mile southwest of the Skerries, which lie off Berskness Westray, the vessel suddenly grounded on a submerged and unchartered rock and remained fast. The engines were put full speed astern without result.

* * * * *

"18. That, in deponent's opinion, the cause of the casualty was a submerged and unchartered rock and it could not have been avoided."

From the above extracts it will appear that the loss of the *Llama* as made out by contemporaneous written statements of her log and officers, was due to a marine peril, to wit, "a submerged and unchartered rock," and that when the ship was struck the vessel was holding a course "which was considered safe by the Master," and that "it could not have been avoided." The physical fact being that the boat was lost by reason of its stranding, and stranding being *prima facie* a marine peril, it follows the burden is on the ship's owner to show that the stranding was caused by one of the war risks insured against as heretofore quoted. *Monroe v. War Risk Ass'n*, 34 Times L. R. 331. This burden the Court below was of opinion the insured met, finding in substance that at the time of the stranding the *Llama* was controlled and navigated by the British lieutenant, who boarded her.

After a study of the proofs we reach a conclusion different from that of the Court below, and that in the light of the facts and law, the libel should be dismissed.

In reaching that conclusion we start, not only with the *prima facies* against the *Llama* arising from her loss by a marine peril, but with a heavy burden of proof arising against her by reason of the fact that no contention, assertion, or even suggestion was made by the captain, when he was called upon to account for the stranding, of any dominating control by the British officer. The silence of the log on that point is highly significant. If control of his (fol. 351) ship was taken away from the captain; if its courses were being determined by an alien officer; if its navigation was being directed; if a log is, as its sphere is, to record the history of the voyage, why should it be

silent on such an all-important thing as the control and navigation of the ship; why should it continue to be written just as it had been written before? Indeed, if we gather an account of subsequent events solely from the log entries we would not know whether the British lieutenant remained on board, for after the log's entry that he boarded the vessel there is not only no statement of his remaining aboard, but the subsequent entries, viz, "Received orders from Cruiser to proceed" and "Hoisted ship's number to British Cruiser," show that all the directions the captain felt worth while for entry in the log referred to those received from the cruiser and not from the lieutenant. Seeing then that both in the comparative privacy of the log and before any situation arose suggesting the recording of evidence on the subject of alien control of the ship, no entry was made indicating such control, we turn to November 2, 1915, when the next evidential statement was made by the captain. The *Llama* had been lost, and he then appeared before the British official empowered by the British Government (see Sec. 517 of Merchant Shipping Act, 1894) to investigate the disaster.

Here every circumstance, the opportunity of clearing himself from all blame and responsibility for the stranding, the obligation of his oath, impelled the captain to give a truthful account of how and why the stranding took place. Presumably moved by the two considerations of self-exculpation and truth disclosures, and knowing, as the statement shows he did, that the *Llama* carried insurance against war risks but none against marine, the captain made no statement that he or the vessel was under compulsion, but on the contrary states that her course was one which both he and the British officer considered

safe; that she grounded on an uncharted rock and in answer to the inquiry of "the cause of the casualty," he stated that in his opinion "the cause of the casualty was a submerged and uncharted rock and it could not have been avoided." We have here then the deliberate, sworn statement of the captain exculpating himself on the ground the *Llama* had struck an uncharted rock while sailing on a course which he approved and which had also the approval of the British officer, a clear case of loss from a marine peril, and with no suggestion of loss from a war peril and this statement made with knowledge that the vessel had no marine peril insurance, but had war peril insurance. Coupled with the significant absence from the log of any suggestion of control of the (fol. 352) *Llama* by the British officer, the sworn statements made by the captain in this casualty inquiry, alleging the loss was a marine one and with no suggestion of control by the British officer, we have a case of contemporaneous and evidential statements of such convincing nature as made the case one where a contrary state of facts, later set up, should be not only of the most convincing character as to their truth but also explanatory of the silence of the captain when every surrounding circumstance called on him to then make such a statement as he now makes for the libellant.

It is said in his behalf that the captain was averse to making any statement before the British tribunal implicating the British officer by showing the latter was directing the course of the *Llama* and was responsible for her standing. To this, an answer would be that if the captain's statement described the true situation, there was no call to shift the blame from him to the British officer, for that state-

ment placed the blame not on faulty navigation of either but on the fact of a submerged and uncharted rock. But the case did not stop with his statement made before an alien official, for on November 13th, the captain, with an officer and members of the crew, appeared before the American Consul at Dundee and again, under oath, entered a marine extended protest wherein he made no assertion that the ship was under the control of the British officer but, after stating, as he had done in the wreck inquiry, that on the night before "the master decided to lie off the land until daylight" the *Llama* proceeded the next morning on her course and that when she stranded, "the vessel was holding a course South magnetic which was considered safe by the master and by the naval officer in charge of the Prize Crew," he alleged she "suddenly grounded on a submerged and uncharted rock."

If these several statements be accepted as a true and full account of the stranding, we have here a loss from a marine peril and resulting from following a course in which both the captain and the British officer concurred. They suggest no dominating control, no superseding of the captain by the British officer, but on the contrary, the selection of the course by the captain and the justification of that selection by the concurrence of the British officer and so regarded we have the case of a peril and a loss due, not to a war risk, but to a marine peril, for the concurrence of the two men in the course was not something done by stress of war, but at most by the concurrent mistake of two men who were attempting to safely navigate a ship through an open fairway but who mistakingly stranded (fol. 352½) her on a submerged, unknown reef. Taken at its most, the

captain thought he was right, the British officer thought the captain was right, but in point of fact, both were wrong. There was nothing partaking of war in the ship going on a submerged, uncharted rock owing to the miscalculation of those directing her course and therefore the cause of the loss, viz, the stranding, the marine character of the peril, is not affected by the one directing the course, whether his or their uniforms were those of a mariner or a naval officer. The stranding was the dominant casual factor of the loss; and that stranding, if the contemporaneous evidence as to the loss be accepted, resulted from the conjoint, but mistaken, navigation of the captain and the British officer.

Accepting then, these contemporaneous statements by the captain of the circumstances as correct, his testimony given nearly six years after to the effect that the navigation of the ship was taken out of his hands by the British naval officer and the course over the submerged reef was one selected by the latter and the ship constrained to follow it without his, the captain's concurrence, is not convincing. There is no explanation by the master of his change of position or as to why he did not enter in the log or in the wreck inquiry or consular protest, assert or even suggest, what he now contends, namely, that the British officer was navigating the *Llama* and stranded her on the reef. Standing alone, these circumstances are such as to cause us to question his later testimony, but when to this is added the fact that the captain had taken the *Llama* through the Westray Firth before but the British officer had never been through it; that the captain admits that when the officer came aboard, he made no statement that he himself was to navigate the vessel or give any instructions to his

own men that they were to do so; the captain's self-contradiction on the stand in testifying first, that he had not been court-marshalled and later admitting that he had been court-marshalled for drunkenness, and in further view of the testimony of the British officer that he did not oust the captain's control over the navigation of the ship, we are clear that the libellant has not met the burden resting upon it, of showing that the *cuasa causans* of the loss was a war risk and not a marine one.

We may refer to other proofs in the case supporting both sides, all of which have had our attention; the testimony of Jansen, the third officer of the *Llama*, in support of the captain's later version (fol. 353); the absence or failure to account for the loss of the chart books in which there might have appeared or been wanting the figuring of courses in confirmation or contradiction of the captain's testimony that the British officer did the charting; and of the fact that while Caldwell, the first assistant engineer, the carpenter and some seamen, were present and were sworn before the Consular inquiry and joined in the account of the loss as then stated by the captain, none of them were called or their absence accounted for in the present proceeding.

The view we have taken of the situation, namely, that the libellant has not satisfied us that the *Llama* was being navigated by the British officer, when she stranded, renders it needless to refer to the many authorities cited, all of which have had our careful examination.

The cause will therefore be remanded to the Court below with directions to vacate its decree and dismiss the libel, the libellant bearing the costs in this Court and in the Court below.

